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ABSTRACT

This pamphlet, intended for senior high school students, examines the complexities of applying international law to questions of individual rights and responsibilities in time of war. Case studies of four actual courtroom trials are presented. Events leading up to the trials (relating to Andersonville, Nuremberg, Hiroshima, and My Lai) are recounted to include various viewpoints. No interpretations are made but study aids leading to discussion of the issues and definition of the principles are provided. A brief history of the development of law as a protector of individual rights from local to national to international is presented and the role of international law is discussed. The final chapter encourages students to plan a model of a world system of law which is effective in protecting individual rights and encourages individual responsibility. The pamphlet concludes with a bibliography of books and feature films. (CK)

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CRISES IN WORLD ORDER

War Criminals, War Victims

Andersonville, Nuremberg, Hiroshima, My Lai

Individual Rights and Responsibilities Under the International System

Illustrated with photographs

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Preface

This book is part of a series, "Crises in World Order." The books in the series deal in various ways with world peace and how to achieve it. Yet none of them is a peaceable book. Each will stir up disagreements, provoke arguments, and probably raise tempers.

This is exactly what each book should do. After all, people don't agree about what causes breakdowns in world peace. They don't agree about what should, or should not, be changed in the international system. They don't agree about what values should underlie the system. These and other areas of disagreement need to be brought into the open and clarified if real progress is to be made toward lasting world peace.

The editors of the series—as well as the series' sponsor, the Institute for World Order—hold a definite point of view. They assume five values or guiding principles for the establishment of a peaceful and just world order. These principles are: (1) Violence should be limited and wars prevented. (2) Levels of economic welfare should be raised around the world. (3) Social justice should be expanded for all peoples. (4) Opportunities for individuals to participate in public decision-making should be broadened. (5) The ecological balance of the global environment should be restored.

Limiting violence and preventing wars come first on this list of values because so much else depends on them. The threat of total war will continue, in the opinion of world-order scholars, as long as we have the present web of international politics (as demonstrated in recurring Middle East crises) combined with military systems of vast scope and destructive efficiency. If most of the human and material resources now devoted to national military budgets were available for peaceful purposes, some of the other values or the foregoing list would be much easier to realize. The major world-order question, then, is: How can war be eliminated?

This point of view, however, is not universally accepted. Many people believe that aggression is a part of human nature and that war is, to some extent, inevitable. Other people would argue that nations may value the social unity produced through war. A third

group argue that violence is often the only means of achieving freedom from such evils as economic and political oppression. The question then becomes: How can we make the fear of war bearable, and how can we keep the destruction of war within acceptable limits?

The aim of this book is not to argue one point of view. The core of the book consists of case studies of four courtroom trials involving individual rights and responsibilities in wartime. Each case may be interpreted in different ways. The editors are not trying to persuade readers to interpret a case in the same way as the editors would. Their main concern is to have readers examine the case and ask questions: What was the chief issue? What were the secondary issues? What happened? Did it have to happen that way? What alternatives were available? What would be the preferred alternatives? What conditions would be necessary for these preferred alternatives to become available?

Answers to such questions will differ, of course. They will differ from person to person and from nation to nation. The cases in the series have been selected and edited by educators from various nations; and they will be studied and discussed by students in various parts of the world. By discussing and testing their differences of opinion, readers will be able to discover common interests and common concerns, and thus will develop new insights into the problems of the emerging global community—and their own place in that community.

War and the Individual

War, it might seem, is the concern solely of governments—the established governments of nation-states or, in civil wars, breakaway governments trying to become established. Governments declare war; governments wage it.

Yet individuals do the fighting. Individuals, including civilians, are the victims. What rights do they have as individuals, as human beings, under the present international system? How are their individual rights guaranteed? Do the guarantees, in fact, work? What should be changed?

The other side of the coin is individual responsibility. Individuals make government policies. Individuals interpret and carry out those policies. In wartime it is individuals, whether behind a desk or on a battlefield, who decide the daily questions: Who? What? When? Where?

What is the nature of an individual's responsibility under such conditions? To whom, or to what, should he hold himself accountable? What moral principles, what laws, should govern his actions? In what kind of court, and by whom, should he be judged?

This book asks you to examine just such questions, as raised in four actual courtroom cases: (1) the trial of a Confederate captain for prison-camp atrocities committed during the American Civil War; (2) the trial of German military and civilian officials at Nuremberg, Germany, after World War II; (3) a legal suit brought by five Japanese to collect damages for injuries suffered when the

United States dropped two atomic bombs on Japanese cities during World War II; (4) the trial of Army Lieutenant William Calley for the murder of civilians in the village of My Lai during the war in Vietnam.

Although each case is different, the central problem in each is the same: how to apply the rule of law to questions of individual rights and individual responsibility in time of war. It is a basic problem, and it raises basic issues—involving universal principles of morality, the individual conscience, and the role of the individual in the international system. How we solve this problem will tell us a great deal about the kind of world we can expect in the future.

Case One

Andersonville

"Why did you obey?"

Prologue

The trial took place in Washington, D.C., shortly after the end of the American Civil War. It was a military trial before a panel of military judges, all of whom wore the blue uniform of officers in the Union army. They served both as judges and as jury. Heading the panel, as president of the court, was Major General Lew Wallace. The prosecutor—in this case called a Judge Advocate—also wore the Union blue. He was Lieutenant Colonel N. P. Chipman. The defense attorneys were civilians.

The defendant had worn the gray uniform of the defeated Confederate army. He was Captain Henry Wirz, formerly the commander of a prison camp for Union soldiers in Andersonville, Georgia. The charge against him: "Wanton cruelty . . . and murder . . . in violation of the laws and customs of war."

An estimated 14,000 men had died at Andersonville. Many had starved to death on a daily diet of rice water, one ounce of rancid beef, and perhaps a piece of moldy cornbread. Others had rotted to death of gangrene and scurvy. Some had died of exposure while huddled naked in holes during freezing winter weather. Many had been tortured to death. These and other horrors were described in court by former prisoners.

Captain Wirz argued that he had maintained this kind of camp under orders from his superior officers. With Union armies marching

Henry Wirz, commander of a Confederate prison camp during the American Civil War. On trial for "wanton cruelty" and murder, he argued that he had to obey his military superior.

through the South, supplies were scarce and feelings against Yankee soldiers were bitter. Thus, Wirz said, he had been ordered to give his prisoners of war nothing in the way of leniency and as little as possible in the way of supplies.

The Trial

The following scene is abridged from *The Andersonville Trial*, a 1960 play by Saul Levitt based on the records of the actual trial. Captain Wirz is on the witness stand being questioned by Judge Advocate Chipman:

CHIPMAN: Mr. Wirz, you are a religious man?

WIRZ: As I have testified–I know how important religion is, and I allowed all ministers–

CHIPMAN: Then, sir, professing religion as you do, would you agree that moral considerations, the promptings of conscience, are primary for all men?

WIRZ: Of course I do! I observe that ideal like most men–when–I–can!

CHIPMAN: When you can. Then you could not observe moral considerations at Andersonville?

WIRZ: That situation was General Winder's responsibility–not mine.

CHIPMAN *(rising, moving closer to Wirz)*: You regarded that situation as General Winder's responsibility because he was your military superior?

WIRZ: Yes–

CHIPMAN: And how far did you deem his authority over you to extend?

WIRZ: To all circumstances, considering that was a military-war situation.

CHIPMAN: To all circumstances. Are you certain of that?

WIRZ: I am absolutely certain!

CHIPMAN: And had he, in that military-war situation, given you a direct order to slaughter one of your own children without giving you an explanation, would you have done that?

WIRZ: That is ridiculous–

CHIPMAN: Would you have done that?

WIRZ: It is ridiculous–I do not answer–!

CHIPMAN: Would you have done that?

WIRZ: No–!

CHIPMAN: Why not?

WIRZ: It would be an insane order–!

CHIPMAN: Yes. Insane. Or inhuman. Or immoral. And a man therefore in his heart does indeed make some inner judgment as to the orders he obeys.

WALLACE *(gavel):* The Court has stated more than once, it is not disposed to consider the moral issue relating to soldierly conduct. It has indicated to the Judge Advocate that we are on extremely delicate ground at any time that we enter into the circumstances under which officers may disobey their military superiors. However, the Judge Advocate apparently feels he must enter that area. He will now advance some legal basis for that line of questioning or withdraw it.

CHIPMAN *(desperately; demanding):* If it please the Court, military courts–judging war crimes–are governed by both the criminal code and by the broader, more general code of universal international law. In most cases that come before them, they will judge specific acts in which the nature and degree of offense is determinable without great difficulty. But, on rare occasions, cases occur demanding from a court a more searching inquiry. Should the Court allow such broad inquiry it becomes more than the court of record in a particular case; it becomes a supreme tribunal–willing to peer into the very heart of human conduct.

WALLACE: The Court is flattered to think it may take on the mantle of supreme tribunal. However, it is still a military court.

CHIPMAN: If it please the Court–

WALLACE: No, Colonel, I'm not through. The Court grants it may be philosophically true that men have the human right to judge the commands of their military superiors, but in practice one does so at his peril.

CHIPMAN *(slowly):* At his peril, yes, sir.

WALLACE *(his tone is deadly):* We would want that the peril of that line of questioning be understood most clearly. We have a question for the Judge Advocate that he may or may not answer–he is not, of course, on trial here. The question is: What is it an honest man fights for when

he takes up arms for his country? Is it the state or the moral principle inherent in that state? And if the state and the principle are not one, is he bound not to fight for that state and indeed to fight against it?

The Judge Advocate need not answer, for we will make the question more particular. If, at the outbreak of the war, the government of the so-called Confederacy had stood on the moral principle of freedom for the black man, and the government of the United States had stood for slavery, would a man have been bound, on moral grounds, to follow the dictates of conscience–even if it had led him to the point of taking up arms against the government of the United States?

CHIPMAN *(anguished):* It is inconceivable to me–

WALLACE: That is not the question–

CHIPMAN: That situation could not possibly occur–

WALLACE: That is not the question–

CHIPMAN *(bursting):* He would have been bound to follow the dictates of his conscience.

WALLACE: Even to the point of taking up arms against the government of the United States?

CHIPMAN *(after a pause; slow):* Yes.

WALLACE *(with deliberateness):* The Colonel understands, of course, that a man must be prepared to pay the penalties involved in violating the–let us say–the code of the group to which he belongs. In other societies that has meant death. In our society it can mean merely deprivation of status–the contempt of his fellows–exile in the midst of his countrymen. I take it the Colonel understands my meaning?

CHIPMAN: He understands what the Court is saying.

WALLACE: And he still feels that he must enter that dangerous area?

CHIPMAN *(now he is pleading; no longer hard):* General, I do not enter that area of my own free will. I enter because I have been forced to it by the nature of this case. *(Moving to the map of the Andersonville prison)* We have lately emerged from a terrible and bloody war and that war has spawned a most sinister and curious crime. Men in the thousands–fourteen thousand men–have been sent to their death–not by bullets on the battlefield, but in a subtle, furtive, hidden manner. We have in the course of this trial examined as it were the outward appearance of hell–its walls, swamp, dogs, its terrible heat and freezing cold. But we have not gotten to the heart of it. We are now faced with the necessity of exploring further into–let us say it again–hell. *(At last Chipman's underlying humanity comes through.)*

I put it to this Court that we owe to those fourteen thousand who died there–to those who mourn them–something so true as to put us head and shoulders above politics, above sectionalism, above the bitterness in our own hearts. I admit to entering this room with that bitterness in myself–I admit to the mood of vengeance. I would now wish to go beyond that if I can. As we say–life is precious–as we cling to our humanity by our fingernails in this world–by our fingernails–let us have a human victory in this room.

WALLACE *(after a pause):* The Court is not unmoved. *(The pause is long as the judges confer, Wallace sitting still in the midst of them, disturbed and considering.)* The Judge Advocate considers as primary to the presentation of his case the moral issue of disobedience to a superior officer?

CHIPMAN *(strained):* Yes, sir.

WALLACE: The Judge Advocate may continue–*(sharply, as Chipman takes a step toward Wirz)* bearing in mind that the Court may conclude at any time that it feels there is nothing more to be gained from this line of questioning.

CHIPMAN *(crosses slowly to Wirz; tired):* Mr. Wirz, we have said that a man does make some inner judgment as to the orders he obeys. That implies that if those orders offend his humanity deeply enough he may disobey them. The authority of General Winder over you was not absolute. And so the question is, why did you obey?

WIRZ *(looking about him rapidly):* Am I required to answer? . . . I did not think of my assignment at Andersonville in that way . . . I do not understand what happens here . . . I thought only in the normal way to obey him, since he was my military superior–

CHIPMAN: But not your moral superior, Mr. Wirz. No man has authority over the soul of another. As we are men we own our own souls and as we own them we are equal as men–the general, the private, the professor, the hod carrier. We are equal as men, sir. And every man alive as he is a man knows that–as you in your heart knew that–

WIRZ: But that is not–

CHIPMAN: And as that situation had become a grossly immoral situation, and as General Winder was not your moral superior, you did not have to obey him. So the question remains, why did you obey? *(Wirz glances toward Wallace.)*

WALLACE: The Court will hear the answer.

WIRZ *(incredulously):* I will say it clearly. I would have been most certainly court-martialed. And if my superiors wished, considering it was a time of war, and that the war had come to a desperate, bitter stage in which the word "traitor" could be sounded in a moment–I might have been executed–

CHIPMAN: It might at least have been for a reason. You might have saved fourteen thousand lives–were you afraid?

WIRZ: I? A soldier? Afraid?

CHIPMAN *(standing over Wirz):* The question then still is–why did you obey?

WIRZ: As I have explained. What heroic thing do you demand I should have done at Andersonville? I--an ordinary man like most men?

CHIPMAN: Mr. Wirz, we who are born into the human race are elected to an extraordinary role in the scheme of things. We are endowed with reason and therefore with personal responsibility for our acts. A man may give to officials over him many things. But not what is called his soul, sir–not his immortal soul. And the question therefore still is–why did you obey?

WIRZ: Why? As I have said. As I say for the last time–it was to me a military situation.

CHIPMAN: But that was not a military situation, Mr. Wirz. Those helpless, unarmed men were no longer the enemy, whatever Winder said. Here was no longer a question of North and South; no longer a question of war; only a question of human beings.

WIRZ: You speak high, Colonel–high! Ask them in this room if they can say in their hearts they would have done different if they had been in my place–ask them. *(In fury and contempt)* You are all the victors here and you make up a morality for the losers!

CHIPMAN: Yes! The victor makes the morality since the loser cannot.

WIRZ: And I spit on that morality! I spit on it! And I say–ask them in this room if they would have done different–ask them–

CHIPMAN: And if they could not, then we must shudder for the world we live in–to think what may happen when one man owns the conscience of many men. For the prospect before us is then a world of Andersonvilles–of jailers concerned only to execute the commands of their masters. And freed of his conscience–fearing only the authority to which he had surrendered his soul–might the jailer not commit murder then? You had to obey orders which you knew were killing men, didn't you?

WIRZ: I had to obey–

CHIPMAN: Even though you knew that to obey was to kill those men–and to disobey was to save them?

WIRZ *(making a curiously helpless gesture):* Even though–simply–I could not disobey. I did my duty as I saw it.

CHIPMAN: I ask you for the last time, Mr. Wirz. Why–and it was not fear of court-martial or dismissal or any external thing–why–inside yourself–couldn't you disobey?

WIRZ *(in a low, relieved exhalation):* Simply–I–could not. I did not have that feeling in myself to be able to. I did not have that feeling of strength to do that. I–could–not–disobey.

Captain Wirz was found guilty of the charge against him. On November 10, 1865, he was hanged. To the end, he maintained that he had been guilty of only two things: obeying orders and being on the losing side.

The original intention was also to charge Wirz's superiors with responsibility for Andersonville and bring them to trial. But especially in the case of top officials like Confederate President Jefferson Davis and General Robert E. Lee, it was decided finally that proving them responsible for Andersonville would be too difficult. Their links with the prison camp were too indirect, and the charge couldn't be made to stick in court.

A number of people disagreed with this decision. They felt that Wirz had been a scapegoat and that everybody involved–including

The highest death rate at Andersonville was 127 in a day. The dead were hurriedly buried by prisoners who volunteered for the work, since it enabled them to get out into the fresh air.

those at the very top of the chain of command—should have been brought to trial.

What do you think?

Discussing the Issues

1. If you had been one of the judges at the court-martial of Captain Wirz, would you have voted to convict him? Why or why not?

2. On page 9 Captain Wirz says of General Winder: "I thought only in the normal way to obey him, since he was my military superior." Do you think the average military person would disobey an immoral order from a superior officer in wartime? Give specific reasons for your answer.

Defining Principles

1. On page 10 Captain Wirz says: "You are all the victors here and you make up a morality for the losers!" Wirz touches on the same point in another scene not included here. In that scene he asserts that the North no doubt had its Andersonvilles, too. How valid is this point? Does it justify Wirz's actions or excuse him to some degree?

2. Following are five pairs of opposing arguments. In which pair of arguments do you think that questions of morality get the *greatest* consideration? In which pair do you think that questions of morality get the *least* consideration?

(a) The South had no reason to treat prisoners of war any better than the North was treating its prisoners of war.

There should have been an agreement that the South treat prisoners of war humanely in exchange for the North's treating its prisoners humanely.

(b) If Wirz had disobeyed orders, he would have been punished by his superiors.

Wirz should not have obeyed or, as commander of the camp, he should have found ways to soften the effect of his orders. He should have realized that the South was losing and that he would be punished by the victors after the war.

(c) Wirz could not be expected to rely on individual conscience. One man's conscience may tell him to save life. Another man's conscience may tell him to take it.

Wirz knew, in his own conscience, the difference between caring for a wounded enemy and deliberately letting him die.

(d) Wirz had an obligation to abide by the laws and regulations of the society he had chosen to be a part of.

For the sake of humanity, some persons will, if necessary, break social laws and regulations. Such individuals recognize, too, the price they must pay as a consequence, and they accept it.

(e) Like every member of a society, Wirz had to do his duty and show respect for authority. Otherwise, the society would collapse.

Individual rights, especially the right to life, must have a place in a social order of whatever kind—or, in the end, it will collapse.

Law, War, and People

Questions of individual rights and responsibility in war are relatively new in human history, though war itself is one of man's oldest institutions. Groups of all kinds—families, tribes, city-states, nations, and coalitions of nations—have long used war to settle disputes and gain advantages. In the process, individuals have rarely had any rights apart from their group. In ancient times, both military prisoners and captive civilians were usually enslaved by the enemy group. Today, civilians caught up in a war may be killed by bombs or rockets, terrorized, or driven from their homes as refugees.

There is another ancient institution, however, which has long been used to settle disputes and protect the individual *within* a society. That institution is law. Without law, no society, no community, can hold together.

The world community also needs law to hold together. This idea has developed slowly, but today it is gaining increased acceptance—largely because of the kind of world we live in. It is a world growing ever more close-knit, yet one in which disputes between groups, particularly nation-states, are often settled by war. And weapons exist which quite simply are capable of destroying humankind. This is why local conflicts, such as those in the Middle East, are viewed today as potential world crises. There is always the danger that they might spread and threaten us all.

A workable body of world law, based on universal principles of

morality and justice, could lessen the danger. But there are problems to be solved and questions to be answered before such a body of law becomes truly effective. Not the least of these are questions concerning the individual, his or her rights, the enforcement of those rights, and the question of the individual's responsibilities. This last question becomes especially hard to answer when it involves a conflict between the individual's responsibility to his nation-state and his responsibility to abide by principles of morality and justice which go beyond the nation-state.

Law and the Nation-State

The most obvious function of law is to regulate the social order. Law provides rules to govern the behavior of members of a society. These rules are intended to make it possible for most members of the group to live together in relative harmony, by providing guidelines for public safety and ground rules for the settlement of disputes.

The gradual extension of one system of law to more and more different groups of people was an important part of the development of the Roman Empire. It also played a role in the development of nation-states in Western Europe after the Middle Ages. The small territories of the feudal system merged into the larger territories of the nation-states, each under the authority of a king who was sovereign—that is, he held final authority in his own land.

These new large political units, nation-states, were able to provide services for their citizens that tribes, baronies, cities, and other small units could not provide. Nation-states could build networks of transportation and communication. They could protect their citizens not only from other nation-states, but from fellow citizens as well. Persons victimized by local authorities could appeal to the higher authority, the nation-state, in the hope of finding justice.

Since citizens no longer depended on self-help to redress harms done to them, but resorted to the courts of the king to settle disputes, the use of force came to be the legal monopoly of the state. National armies protected citizens against outside forces. And beginning in the eighteenth century, police systems were formed to protect law-abiding citizens from the lawless elements within the nation.

During this same period, legal guarantees of the rights of citizens developed as well. Within Western law, the idea emerged that the nation-state should be the protector—indeed, the guarantor—of

individual rights. This idea was expressed in such documents as the American Declaration of Independence and the Bill of Rights to the American Constitution.

Law and War

One of the most significant results of extending one system of law over a wide area, such as a nation-state, was that it reduced the amount of armed combat between groups and individuals *within* that nation-state. But at the same time, the destruction and suffering caused by wars *between* nation-states continued.

Gradually the idea began to develop that law might be a substitute for international warfare also. In 1899 the Hague Tribunal was established in the hope that nations would turn more to law and less to force to settle disputes. However, disputes were brought to this court only if the conflicting nations wished to do so—and war persisted.

In 1928, there was an attempt to "outlaw" war. The Kellogg-Briand Pact of that year declared that the nations signing it would renounce war as an instrument of national policy. But it was not until 1945, when the United Nations included the same principle in its charter, that this concept became fully recognized under international law. This was after the most destructive war in human history.

It was after World War II, also, that the first serious consideration was given to the role of the individual in international affairs. Questions were raised about the responsibility of individual German and Japanese leaders whose acts were seen as having been the major causes of World War II.

Questions of individual responsibility in wartime are thorny ones. To whom, for example, does the individual owe his allegiance? War may threaten the very existence of the states involved. All the energies of a nation-state are then directed toward preserving itself. Many guarantees of individual rights may be suspended in the interest of national security. Full allegiance of the individual to the national interest is demanded.

Under such circumstances, individuals—particularly those in combat—may face severe moral dilemmas which sometimes bring them into conflict with the authority of the nation-state. These dilemmas become all the more acute during a limited type of war, where the survival of a nation-state is not directly threatened—yet the state demands the same kind of allegiance as if national survival were the issue.

Moral dilemmas faced by individuals are by no means limited to men in combat. What, for example, should a research analyst do when he or she discovers records showing that a nation's leaders have lied to the people about the circumstances of a long and costly war? Does the national interest demand that those records be kept secret? Or what should a young man do, when called into wartime service, if he is not a pacifist but strongly believes that the war is illegal under international law?

The purpose of the following cases is to raise questions about the political problems and moral dilemmas faced by individuals in the international system.

Are there limits which should be placed on an individual's obligation to the state, even in time of war?

What standards might be used to set limits on the power of the state to govern individual actions, when the issues involve principles of morality and international law?

Can fundamental rights of individuals be guaranteed under international law?

Can international law be a truly effective instrument for dealing with moral and/or political issues arising among sovereign states?

Can a world political system which protects individual rights and encourages individual responsibility be devised? What would such a system be like? Upon what moral and legal principles should it be based?

These are questions for all of us to explore, because the answers concern all of us.

Make some brief notes on these questions now. When you have finished the book, return to your notes to see if and how your responses have changed.

Case Two

Nuremberg

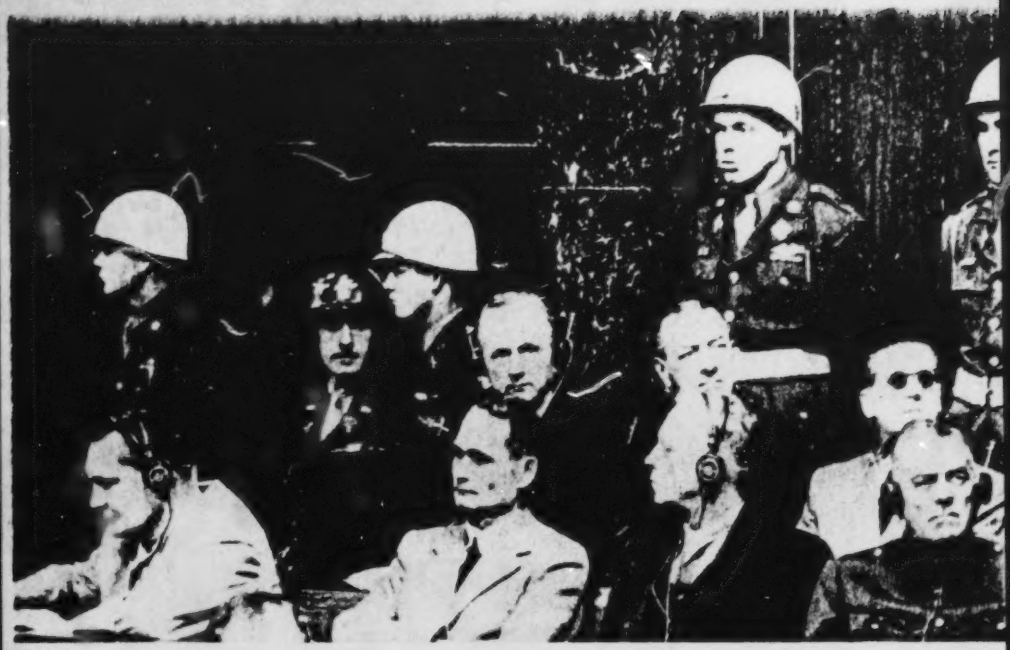
"Toward establishing rules"

Prologue

Some of the twenty-two defendants wore military uniforms, others civilian clothes. Some had been relatively minor government officials. Others had been among the most powerful men in Europe. Now they all sat together on wooden benches in a courtroom in the Palace of Justice, Nuremberg, Germany. The room's high ceilings and the carved wood paneling on the walls and judges' bench gave the setting an air of grandeur.

The defendants were former military leaders and civilian officers of Nazi Germany, the government responsible for starting World War II. This war, the largest-scale war in history, had ended in defeat for Germany and its allies in April 1945. On August 8 the four victorious nations—the United States, the Soviet Union, Great Britain, and France—had signed an agreement called the London Charter. It provided that Nazi leaders would be held personally accountable for policies of aggressive warfare and mass killings of civilians, and that the Nazis would be tried by an International Military Tribunal.

The Tribunal convened in the Nuremberg courtroom in the fall of 1945. It consisted of eight judges, two from each of the victorious nations, under the chairmanship of Sir Geoffrey Lawrence of Great Britain. Each of the four victors also sent a team of prosecutors. A German team of twenty-seven lawyers represented the Nazi defendants.



Nazi leaders on trial at Nuremberg—the first time that individuals had ever been put on trial for "crimes against the peace of the world." Front row, left to right: Hermann Goering, Rudolf Hess, Joachim von Ribbentrop, and Wilhelm Keitel.

Among the top-level defendants were Hermann Goering, Marshal of the Reich; Wilhelm Keitel, Chief of the High Command of the German Armed Forces; and Foreign Minister Joachim von Ribbentrop. Two other top Nazi leaders would have been on trial if they had not committed suicide—Heinrich Himmler, head of the secret police, and Joseph Goebbels, chief propaganda minister. Also dead of suicide was the man who, more than any other, had been responsible for starting World War II: Adolf Hitler, Chancellor and dictator of Nazi Germany.

Hitler had risen to power in the late 1920s and early 1930s. It was a bitter Germany at that time, wracked by economic depression, humiliated by defeat in World War I, resentful over the harsh terms imposed by the Treaty of Versailles after the war. Hitler, with his Nazi party, took advantage of this situation to make himself master of the nation. His propaganda machine promised Germans a new and glorious future, and most of the people believed him.

But there was no place in Hitler's plans for one group of people: the Jews. His was to be a "racially pure" Germany, a Germany for

the Germans. At first, the Jews were merely persecuted. Later they were killed—not only German Jews, but during the war, the Jews of conquered countries—deliberately and systematically killed by the millions. More than half the Jewish population of all Europe was wiped out, most of them in ovens and gas chambers especially built for the purpose. Such a crime was later to be defined by the United Nations as *genocide*, the murder of a people.

Hitler's way to glory was also the way to war—as he himself stated:

> The aim of German policy is the security and preservation of the nation and its propagation. . . . The German nation comprises 85 million people which . . . form a homogeneous . . . racial body, the like of which cannot be found in any other country. . . . It justifies the demand for larger living space more than for any other nation. . . . The history of all times . . . has proved that every space expansion can only be effected by breaking resistance and taking risks. . . . The German question can be solved only by way of force.

Hitler annexed Austria and a part of Czechoslovakia in 1938 without having to face armed resistance. In 1939, he took over the rest of Czechoslovakia. Next on his list was Poland. But Great Britain and France had promised to come to Poland's aid if that country's independence was threatened. So when German military forces attacked Poland early in the morning of September 1, 1939, the invasion meant war with Great Britain and France as well, and the beginning of World War II. (The Soviet Union also invaded Poland. At this early stage, the Russians had a nonaggression pact with Germany. Later, when Hitler broke the pact and the Germans invaded the Soviet Union in 1941, the Russians joined the side of the Allies—the United States, Great Britain, and France.)

Almost six years after the invasion of Poland, and after an incredible amount of destruction and the loss of many millions of lives, the war was over. Adolf Hitler, the man most responsible, was dead. But Hitler could not have acted alone—and twenty-two of the individuals accused of helping him were in the dock at Nuremberg.

The Trial

The prosecution in the Nuremberg trials set out to prove:

(1) The Nazis, in their dealings with actual and imaginary enemies (Jews, Slavs and other "racially impure" peoples), both in Germany and in other countries, had committed war crimes and crimes against humanity—particularly the crime of mass murder, or genocide.

(2) The Nazis, before and during the war, had violated international law and disarmament treaties.

(3) The annexation of Austria and Czechoslovakia, and especially the attack on Poland which had started the war, as well as the occupation of Denmark and Norway, constituted crimes against peace–the planning and waging of a war of aggression.

There was no lack of evidence that the acts in question had actually been committed. In the instance of Nazi policy toward Jews, for example, the Nazis themselves had thoroughly documented and filmed the carrying out of this policy; their records and films were available.

For every charge, the prosecution was able to amass overwhelming evidence. The complete testimony, records, and documents of the Nuremberg trial fill more than 25,000 pages in forty-two volumes.

In the face of this huge mass of evidence, the Nazis' defense attorneys offered three main arguments.

One was the same kind of argument made by Captain Wirz in the Andersonville trial: that the individuals in the dock at Nuremberg had been only cogs in the machinery of the German state. Adolf Hitler had made the decisions to kill the Jews and to wage aggressive war. His subordinates had had no choice but to carry out the dictator's wishes. Otherwise, they might have been hanged or shot as traitors.

A second defense argument was based on a legal-moral principle known as *tu quoque,* which is Latin for "you also." The principle states that those sitting in judgment are no better than those being judged if they have committed similar crimes. Thus any German war crime could be balanced against a similar act by the United States, Great Britain, or the Soviet Union. One such act was the bombing and shelling of the German city of Dresden, where 150,000 civilians were killed. The victorious powers were not being called to account for their own war crimes simply because they were the victors.

A third argument was based on another legal principle, *nulla poena sine lege praevia,* which is Latin for "no punishment without prior law." The German lawyers argued that the defendants were being tried for some crimes that were not crimes under international law at the time they were committed.

During the court proceedings dealing with the German invasion of Poland in 1939, all three defense arguments were used.

At one point, the prosecution contended that the attack on Poland had been premeditated–deliberately planned with the help and knowledge of individuals on trial at Nuremberg. Documents were produced, records of Nazi meetings held before the attack. One was a record of a conference held on May 23, 1939, at which some of

the defendants had been present. The document, said the prosecution, showed "the cold-blooded premeditation of the assault on Poland."

The defendants denied that the attack had been premeditated--at least not by any of the individuals on trial at Nuremberg. Testimony from the trial indicates the prosecution's line of reasoning. Sir David Maxwell-Fyfe, a member of the British team, is here questioning two of the defendants: Admiral Erich Raeder, commander of the German fleet, and Foreign Minister Ribbentrop. He is referring to the record of the conference held on May 23, 1939.

MAXWELL-FYFE: It is quite clear from the document that [Hitler] did want war, isn't it?

RIBBENTROP: This document, no doubt, holds the intention of an action against Poland, but I know that Hitler often used strong language to his military men. . . . He spoke as though he had the firm intention of attacking a certain country in some way, but whether he actually would have carried it out later is an entirely different question. I know that he repeatedly told me that one had to talk with military men as if war was about to break out here or there on the next day.

MAXWELL-FYFE: When you heard [Hitler] say that on the 23rd of May, did you still think he had no aggressive intentions?

RAEDER: I thought so for a long time after that . . . because by this time I was getting to know Hitler and was familiar with the exaggerations contained in his speeches.

G. D. Roberts of the British prosecution team questioned another defendant: General Field Marshal Milch, Inspector General of the German Air Force.

ROBERTS: Was any protest made by any of these honorable men at the breach of Germany's pledged word?

MILCH: During this meeting it was impossible for anyone present to speak at all. Hitler addressed us from his desk and after the speech he left the room. A discussion did not take place; he did not allow it.

This same argument was enlarged upon by two defense attorneys, Dr. Siemers and Professor Jahrreiss, referring to records of several Nazi conferences in 1939.

SIEMERS: Undoubtedly these key documents are of the utmost importance for the subsequent historical findings on what trains of thought motivated Hitler. . . . I nevertheless believe that the prosecution overestimates the importance of these . . . documents by far. . . . In reality, the assertion of the prosecution that an influential group of Nazis assembled to examine the situation and make decisions is incorrect; the occasion took the form of an address by Hitler alone and no discussion and no consultation took place. . . .

Altogether I have the impression that, in its conception of a conspiracy to wage wars of aggression, the prosecution has conceived an entirely false picture of the real distribution of power within the National Socialist State. . . . The prosecution fails to recognize the characteristics of a dictatorship, and indeed it may be very difficult to recognize Hitler's absolute power as a dictator. . . . I have the impression that in judging the situation as a whole the prosecution has never completely relinquished the idea of a parliamentary government nor taken the uncompromising ways of a dictator into account.

JAHRREIS: [Hitler] was the arbiter of war and peace between the German Reich and other nations—he alone.

Robert H. Jackson, who headed the United States team, countered that argument for the prosecution:

JACKSON: The defendants may have become the slaves of a dictator, but he was *their* dictator. To make him such was . . . the object of the Nazi movement from the beginning. . . . These men destroyed free government in Germany and now plead to be excused from responsibility because they became slaves. . . . What these men overlooked is that Adolf Hitler's acts were their own acts. . . . They put a loaded gun in his eager hands. It was left to Hitler to pull the trigger, and when he did they all at that time approved.

The Tribunal ruled in favor of Jackson's arguments, noting:

A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them. . . . Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan. . . . That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts.

In making its *tu quoque* ("you also") argument, the defense presented an affidavit concerning a secret agreement in 1939 between the Germans and the Russians. The Russians were now participating in the trial as members of the prosecution. But the agreement, which had been signed by German Foreign Minister Ribbentrop and Soviet Foreign Minister V. M. Molotov, clearly pointed to aggressive intentions against Poland by the Soviet Union. Under the terms of the agreement, the Russians were to take over a large portion of Polish territory. The proceedings grew extremely tense as Dr. Seidl, a counsel for the defense, attempted to introduce the affidavit as evidence.

SEIDL: On August 23, 1939, at Moscow, a nonaggression pact was

Polish Jews barricaded in the Warsaw ghetto in 1943. The last 40,000 Jews resisted, virtually unarmed, a German deportation order. But the Nazis eventually killed or sent to concentration camps almost all of them.

concluded between Germany and the Soviet Union. . . . On the same day, that is to say but one week before the outbreak of the war and three days before the planned attack on Poland, these two nations made another secret agreement. This secret agreement essentially contained the definition of the spheres of interest of both nations within the European territory [Poland] lying between Germany and the Soviet Union.

THE COURT: Dr. Seidl, . . . this is . . . simply the occasion for introducing documents.

SEIDL: I intend to say a few introductory words on a document which I shall submit to the Tribunal.

THE COURT: Have the prosecuting counsel any objections to passages being read from this document?

RUSSIAN PROSECUTOR RUDENKO: I did not know about the existence of this document and I therefore strenuously object to having it read into the record. . . . I do not know . . . what secret agreements counsel for the defense is talking about. . . . I request that this document should not be read into the record.

SEIDL: Under the circumstances I am compelled to move that Foreign

Commissar Molotov of the Soviet Union be called as a witness.

THE COURT: We want to see the document itself . . . have it translated . . . and then . . . we can reconsider the matter.

Later the defense called Foreign Minister Ribbentrop to the witness stand.

RIBBENTROP: I talked very frankly during the negotiations with Stalin and Molotov, and the Russian gentlemen also used plain language with me. . . . I left no doubt . . . that it was possible that an armed conflict might break out. . . . There is no doubt that Stalin can never accuse Germany of an aggression or of an aggressive war for her action in Poland. If it is considered an aggression, then both sides are guilty of it.

After a two-week interval, Dr. Seidl said he had a copy of the secret agreement, and attempted to introduce it as evidence.

THE COURT: Sir David, have you any objection to that document being produced for the consideration of the Tribunal?

BRITISH PROSECUTOR MAXWELL-FYFE: Not at all, my Lord.

RUSSIAN PROSECUTOR POKROVSKY: We object. . . . We [consider it unnecessary] to grant the request of Dr. Seidl regarding a group of questions connected with the German-Soviet Pact of 1939.

Defense counsel persisted in attempts to get the document admitted as evidence. The court twice repeated its promise to consider the matter. Finally, after weeks of pursuing the issue, Dr. Seidl was questioned.

THE COURT: Where does the document which you are presenting come from?

SEIDL: I received this document a few weeks ago from . . . the Allied side . . . on condition that I would not divulge its origin.

AMERICAN PROSECUTOR DODD: I certainly join General Rudenko in objecting to the use of this document. We now know that it comes from some anonymous source. We do not know the source at all.*

The prosecution argued that information about the secret agreement was not relevant to the charges made against the Nazis. In the words of British prosecutor Sir Hartley Shawcross: "Defense counsel have sought to base some argument on the . . . German-Soviet pact. They argue that it is wrong. I am not concerned with that. . . . But let them argue that it was wrong. Do two wrongs make a right? Not in that international law which this Tribunal will administer."

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*Today the document in question is known to be authentic and is reprinted in many textbooks.

The defense's *tu quoque* argument was set aside. The secret document was not considered in the Tribunal's final judgment. On the *tu quoque* argument in general, the Tribunal chairman, Lord Justice Sir Geoffrey Lawrence, stated: "We are not trying whether any other powers have committed breaches of international law, or crimes against humanity, or war crimes; we are trying whether these defendants have."

On the principle *nulla poena sine lege praevia* ("no punishment without prior law") the defendants argued that the acts for which they were on trial—in particular, the invasion of Poland—had not been crimes when committed. They contended that the London Charter was not legally binding because it declared in 1945 that acts committed in 1939 were now punishable under international law although no such law had existed in 1939.

The prosecution countered by pointing out that on August 27, 1928, Germany had signed the Kellogg-Briand Pact. Article 1 of the Pact said: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy."

But the defense argued that the provisions of the Kellogg-Briand Pact had existed only on paper:

> Mankind had a "grand vision of world peace" then. . . . Humanity did not follow this path. . . . This is the all-important factor in our problem of law. Before the commencement of the Second World War the whole system of collective security . . . had collapsed. . . . In the actual relations between states there existed . . . no effective general ruling of international law regarding prohibited war. . . .
>
> The [London] Charter . . . is laying down fundamentally new law. . . . The regulations of the Charter . . . anticipate the law of a world state. They are revolutionary. Perhaps, in the hopes and yearnings of the nations, the future is theirs.

The *nulla poena sine lege praevia* argument, like the *tu quoque* argument, was dismissed by the court. In its judgment the Tribunal said: "After the signing of the Kellogg-Briand Pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."

The court ruled, after exhaustive judicial proceedings over a period of 218 sessions, that the Nazis had conducted wars of

aggression, had violated international treaties, and had planned and used methods of enslavement and mass-murder—and that nineteen of the defendants bore responsibility as individuals for those crimes.

The convicted defendants received varying sentences, according to degree of guilt. Some were sentenced to prison terms. Eleven were sentenced to be hanged. Ten *were* hanged. The eleventh, Hermann Goering, managed to commit suicide by poisoning himself two hours before his scheduled execution.

Many people have been critical of the Nuremberg trial. They have claimed that the prosecution had advantages in obtaining important documents and witnesses. They have also criticized the composition of the court—victorious Allies sitting in judgment over a defeated enemy.

However, U.S. prosecutor Robert Jackson expressed the hope that the Nuremberg trial had helped international law to take a historic step forward. The law was being applied at Nuremberg against German aggressors. But, Jackson said, "the law . . . if it is to serve a useful purpose . . . must condemn aggression by any other nations, including those which sit here now in judgment."

Albert Speer, who was sentenced to twenty years in prison for his role as a high Nazi official, expressed a hope similar to Jackson's. In Speer's final statement before the Tribunal, he said: "As a former minister of a highly developed armament system it is my last duty to say the following: A new large-scale war will end with the destruction of human culture and civilization. . . . Therefore this trial must contribute toward preventing such degenerate wars in the future, and toward establishing rules whereby human beings can live together."

The Nuremberg trial did contribute toward establishing such rules. A few years later, the United Nations directed a group of experts in international law, from major legal systems of the world, to meet and to define officially the principles underlying the Nuremberg judgments of 1946. These Nuremberg Principles were defined in 1950. They are the most important set of general guidelines available on questions of personal responsibility under international law.

THE NUREMBERG PRINCIPLES, 1946

I. Any person who commits an act which is a crime under international law is responsible himself and may be punished.

II. Even if domestic law does not impose punishment for crimes under international law, the person who commits such acts is still responsible under international law.

III. Even if a person who commits such acts is a Head of State or a responsible government official, he is still personally responsible.

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IV. Even if a person committed the criminal act under orders from his government or a superior, he is still responsible, if a moral choice was in fact possible for him.

V. Any person charged with a crime under international law has the right to a fair trial on the facts and the law.

VI. Crimes punishable under international law are:

a) *Crimes against peace*, which constitute planning, preparing, or starting a war in violation of international agreements and participating in any of those acts.

b) *War crimes*, which include, but are not limited to: murder, ill-treatment, deportation to slave labor of civilians in occupied territory; murder or ill-treatment of prisoners of war; killing hostages; wanton destruction of cities, towns, or villages; or devastation not justified by military necessity.

c) *Crimes against humanity*, designated as: murder, extermination, enslavement, deportation, and other inhuman acts against civilians; or persecution on political, racial, or religious grounds when such acts are carried out in connection with any crime against the peace or war crime.

VII. Complicity in any of the crimes enumerated in Principle VI is a crime under international law.

Survivors of a Nazi concentration camp, shortly after the arrival of Allied liberation forces.

Discussing the Issues

1. Some of the Nuremberg defendants argued that Adolf Hitler, as absolute dictator, was totally responsible for Germany's war crimes—and that they had to carry out his orders. What do you think of this argument?

2. Why did the defense attorneys want to introduce the secret document showing that the Russians and the Germans had agreed in 1939 to divide up Poland?

3. What did the Tribunal decide about the *tu quoque* ("you also") argument? If you had been a judge of the Tribunal, how would you have voted?

4. The U.S. Constitution (in Sections 9 and 10 of Article I) forbids the passing of an *ex post facto* law. For example, someone is driving 30 miles an hour through a 30-mile-an-hour zone in a small town. The driver is stopped by the police. The town officials immediately pass a new law reducing the speed limit to 25 miles an hour—and charge the driver with speeding. Why do you think the Constitution forbids this kind of law? What is the relationship to the principle of *nulla poena sine lege praevia* ("no punishment without prior law") put forth by the defense at Nuremberg?

Defining Principles

1. What were the three main defense arguments put forth in the Nuremberg trial? Which of these were also used by Captain Wirz in the Andersonville trial? What do you think of the merits of each of the arguments?

2. Review the three categories of Nuremberg Principle VI (page 27): crimes against the peace; war crimes; and crimes against humanity. Think of actual examples for each category. Now imagine that you were ordered to carry out one of these actions. Would you obey? Give specific reasons.

3. In both the Andersonville trial and the Nuremberg trial, the judges were wartime victors sitting in judgment over defeated enemies. Should the enforcement of rules for the conduct of war always depend on which side wins? What might be a better guideline for enforcing such rules?

Case Three

The Shimoda Lawsuit

"To recognize individual rights"

Prologue

In late summer of 1945, the following news appeared in the American press:

> WASHINGTON, August 6—The U.S. Army Air Force has dropped on Japan an atomic bomb containing more power than 20,000 tons of TNT.
>
> It produces more than 2,000 times the blast of the largest bomb ever used before.
>
> The bomb was dropped 16 hours ago on Hiroshima, an important Japanese army base.
>
> The announcement of the development was made today in a statement by President Truman released by the White House.
>
> Mr. Truman said: "It is an atomic bomb. It is a harnessing of the basic power of the universe. The force from which the sun draws its power has been loosed against those who brought war to the Far East."
>
> Secretary of War Henry L. Stimson predicted today that the atomic bomb will "prove a tremendous aid" in shortening war with Japan. The war secretary made his statement as the Army reported that an "impenetrable cloud of dust and smoke" choked Hiroshima after it was hit by the new weapon.

In Hiroshima the time was 8 A.M. on August 6 when the single B-29 plane dropped its deadly cargo. The bomb exploded on target—right over the center of the city. First there was a white flash of blinding light, next the deafening sound of the explosion, then a wave of searing heat. Within a 2½-mile radius of the center, almost everyone

Devasted Hiroshima shortly after the dropping of the atomic bomb. Ten years later the Tokyo District Court was asked to rule whether the bombing had violated international law.

died instantly from the blast itself. In many parts of the city, people were killed or injured by falling buildings or in the hundreds of fires that enveloped Hiroshima. Over 260,000 people died, in one way or another, from the effects of the explosion. Countless others were to die later from the effects of the bomb's radiation.

On August 9, three days after the raid on Hiroshima, an American plane dropped a second atomic bomb, this one on the city of Nagasaki. The bomb landed off target, exploding over an industrial section four miles from the heart of the city. An estimated 70,000 people died in the blast.

The next day, Japan lodged a protest against the United States in a note sent through the government of Switzerland:

> The United States has used a new bomb in this case which has indiscriminate and cruel character beyond comparison with all weapons and projectiles of the past. This is a new offense against the civilization of mankind. The Imperial Government impeaches the Government of the United States in its own name and the name of all mankind and of civilization, and demands strongly that the Government of the United States give up the use of such an inhumane weapon instantly.

The United States rejected the protest, coming as it did from a wartime enemy. However, the questions raised were ones that some

American officials and scientists had already raised while the bomb was being developed.

President Harry Truman had finally made the decision to use the bomb. He and his advisers calculated that, however many lives might be lost, there would be a greater loss of life—on both sides—if the United States had to invade Japan to force her to surrender. It was the arithmetic of war.

But first an ultimatum was sent to Japan from Potsdam, Germany, where President Truman was meeting with Soviet Premier Josef Stalin and British Prime Minister Winston Churchill. The ultimatum, known as the Potsdam Declaration, said:

> There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security, and justice will be impossible until irresponsible militarism is driven from the world.
>
> Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are setting forth. . . .
>
> We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction.

The key phrase, "prompt and utter destruction," went unheeded by the Japanese, who still knew nothing about the secret development of a bomb that could destroy an entire city. The Japanese leaders rejected the American ultimatum.

Later, when President Truman announced that the atomic bomb had been dropped on Hiroshima, he noted that the Potsdam ultimatum had been intended "to spare the Japanese people from utter destruction." The atomic bomb, he said, was America's answer to Japan's rejection of the ultimatum.

No further ultimatum was needed after the bombings of Hiroshima and Nagasaki. On August 14, 1945, Japan surrendered, as Germany had done several months before. World War II was finally over, and a relieved world celebrated. Most people were in no mood to ask serious questions about the morality of bombing civilians in undefended cities.

Yet there *were* questions to be asked, both moral and legal questions. For example, did the people of Hiroshima and Nagasaki have any rights as individuals—or were their lives merely something to be numbered in the arithmetic of a war conducted between

nations? If they did have rights as individuals–including the most basic right of all, the right to life–should they not also have the legal right to sue for damages as individuals?

Five Japanese citizens–four of them from Hiroshima and one from Nagasaki–thought so. But whom could they sue? There was no international court to hear a case brought before it by *individuals.* International courts, except in special instances, deal with disputes between *nations.*

Moreover, the peace treaty between Japan and the United States stated that Japan forfeited all claims for damages by Japanese citizens against the United States. Thus, in signing the peace treaty, Japan had signed away the right to ask for damages on behalf of her citizens.

So the five plaintiffs did the only thing they could do: They brought suit against their own government, the government of Japan.

The Trial

On one side of the Tokyo District Court was a group of lawyers representing the defendant, the government of Japan. On the other side were the five plaintiffs and their ten lawyers. The year was 1955, ten years after the bombings of Hiroshima and Nagasaki. The plaintiffs, three men and two women, all showed physical effects of the experience they had lived through ten years before. The two women had badly scarred faces, and all five plaintiffs seemed in poor health. There was, moreover, an aura of despair about them all, the kind of despair that comes from great and permanent loss.

The three judges who would hear the case filed in behind the bench and sat down. The court came to order, and the trial began.

On one level it was a personal-injury suit brought by Japanese citizens against their government for damages suffered in war. The sums were modest, ranging from $350 to $825, plus five percent interest from the day the trial began until payment was made.

But on another level the court was being asked to rule on the legality of the atomic-bomb attacks which had caused the injuries, and on the question of whether individuals had a right to sue under such circumstances.

The plaintiffs argued that the use of atomic bombs violated international law, and the domestic law of Japan. The plaintiffs argued further that *both* nation-states and individuals have rights and may claim damages under international law. However, Japan, upon signing the peace treaty at the end of World War II, had waived the rights of its citizens to claim any damages against the United States

as a result of the war. The plaintiffs argued that this waiver of rights (1) violated the Japanese government's responsibility to protect the rights of its citizens and (2) made the Japanese government *itself* liable for damages that had been inflicted on Japanese citizens by the United States.

The plaintiffs' lawyers opened by attempting to show: first, that the injuries had indeed occurred to the plaintiffs; and, second, that these injuries were the result of a violation of international law.

The plaintiffs presented a vivid description of their injuries. When the atomic bomb was dropped over Hiroshima, Ryuichi Shimoda was 47 years old and in good health. He lived with his family and ran a small factory. Four daughters, ranging in age from 4 to 16, and a 12-year-old son were killed by the atomic bomb. Shimoda and his wife were injured by the blast, heat, and radiation. At the time of the lawsuit Shimoda was suffering from tumors and was unable to work for a living. His wife and a surviving son also exhibited symptoms of atomic-bomb injuries. Without income, the family managed to exist on the little money sent to them monthly by Shimoda's sister in Honolulu.

Suji Hamabe was a 54-year-old office worker when the atomic bomb fell on Nagasaki. His entire family—his wife and three daughters—were killed.

Bunji Iwabuchi, with his wife, ran a small business making pine-root oil when the bomb fell on Hiroshima. Their adopted daughter, her husband, and year-old son died in the atomic blast. Only Iwabuchi and his wife survived.

Maki Tada was injured on her face, shoulders, feet, and chest. At the time of the lawsuit, she suffered pain from tumors. Her husband had left home because he disliked her disfigured appearance. She lived alone with some assistance from the government.

Tochiko Kawashima was 14 years old when the atomic bomb exploded over Hiroshima. Injuries on her face and left arm left her badly scarred. Her father and mother died from effects of the blast, heat, and radiation. She and her brothers and sisters were left without means of support, and were forced to live separately with relatives.

Although the number of dead was cited as evidence of the bomb's extreme cruelty, the plaintiffs' attorneys said numbers alone failed to describe the "disastrous scene after the atomic bombing. People in rags of hanging skin wandered about and lamented aloud among dead bodies. It was an extremely sad sight beyond the description of a burning hell, and beyond all imagination of anything heretofore known in human history."

To demonstrate that the two bombings violated international law, the plaintiffs' attorneys cited a number of treaties and international agreements. In their judgment these agreements prohibited the use of weapons such as the atomic bomb. Among the treaties and agreements cited were the following:

The Hague Regulations Respecting the Laws and Customs of War on Land (1899) prohibited the use of weapons that inflicted unnecessary pain and suffering. Attacks on undefended cities were also banned. A notice of intent to bombard was required, and bombardment was to be limited to military objectives.

The Second Hague Conference (1907) outlawed the use of dumdum bullets, and the *Geneva Protocol* (1925) prohibited the use of poison gas and other inhumane weapons. The plaintiffs argued that the atomic bomb was certainly as inhumane as poison gas, if not more so. Thus, they argued, the bomb's use was forbidden by international law.

The Draft Rules of Air Warfare (1923) banned aerial bombardment for purposes of terrorizing a civilian population, destroying nonmilitary property, or injuring noncombatants. The same agreement asserted that aerial bombardment would be legitimate only when directed at military objectives. Aerial bombing would not be allowed if it would have an indiscriminate effect on civilians. A belligerent nation would be liable for compensation for injuries to persons and properties caused by violation of the limitations set by the agreement.

The plaintiffs' attorneys charged that Hiroshima and Nagasaki had not been centers of war production, nor had they contained important military bases or targets. Both cities had been undefended and attacked by surprise. They argued that President Truman and the United States had been aware of these facts. The United States also knew, the attorneys charged, that the atomic bomb would affect civilians as well as military persons. The attorneys contended, therefore, that the use of atomic bombs at Hiroshima and Nagasaki was forbidden by international agreements.

Of course, the Japanese government, in its protest note of August 10, 1945, had charged that the atomic bombings were inhumane and illegal.

Suppose the bombings *were* illegal under international law—how did that justify bringing a suit for damages against the government of Japan? This was the second part of the plaintiffs' case. It rested on the argument that individuals, as well as nations, have the right to claim damages under international law. The very wording of Article 19, in the peace treaty signed by Japan and the United States, implied the existence of such a right: "Japan waives all claims of Japan *and its nationals* against the Allied Powers and their nationals

arising out of war or out of actions taken because of the existence of the state of war."

The plaintiffs' attorneys argued that the government of Japan, by agreeing to Article 19 of the peace treaty, had thrown away the right of its citizens to claim damages. In so doing, the government had taken upon itself the legal responsibility to pay compensation for damages inflicted by the United States.

The government of Japan, as defendant in the Shimoda lawsuit, did not contest the facts about the bombings of Hiroshima and Nagasaki. The government *did* argue, however, that the bombings could not be proven illegal under international law. No treaty governed or specifically prohibited the use of atomic weapons at the time of the attacks. The Hague Regulations Respecting the Laws and Customs of War on Land, and other treaties cited by the plaintiffs, had been concluded before the invention of an atomic bomb. Those treaties, therefore, could not prohibit the use of atomic weapons.

"War," said the defendant Japanese government, "is originally the condition in which a country is allowed to exercise all means deemed necessary to cause the enemy to surrender. . . . The first consideration is to crush the military force of the enemy." The American bombings at Hiroshima and Nagasaki had the intended

Hiroshima survivors of the atomic bomb, suffering from severe burns and other injuries. The Tokyo District Court was asked to rule whether such individuals had the right to claim damages under international law.

military effect. They forced Japan's unconditional surrender without further fighting. Therefore, the Japanese government claimed, the bombings probably saved more human lives, both Japanese and American, than they cost.

As for the protest note of August 10, 1945—in which the Japanese government itself had complained of the illegal bombing of undefended cities—the government now took the opposite position and disavowed the note. The statements made in the note, the government said, were made by a nation at war and could not be objective. In 1955, ten years later, "taking the objective view, apart from the position of a belligerent, we cannot draw the same conclusion today."

In brief, the defendant—the nation-state that had been brought to defeat by the atomic bomb—now argued that the bombings had been legal. New weapons, said the defendant, cannot be judged illegal under international law written before the weapons existed. And as long as there was doubt that the atomic bombings violated international law, the plaintiffs could not claim damages.

Perhaps the most significant arguments put forth by the defense were those concerning individual rights under international law. Injured persons, the government of Japan contended, cannot claim damages in their own right when international law has been violated. Only a national government has such rights, because laws affecting the conduct of war are matters of relationships between national governments. If individuals are injured by violations of the laws of war, only their government is in a position to claim damages for them. If damages are collected, the national government can determine how to distribute them, and to whom. The only time individuals have rights under international law is when a treaty clearly specifies that they do.

Since governments decide whether to claim damages for their nationals, Japan had the right to give up her citizens' claims for damages arising from the bombings of Hiroshima and Nagasaki. Even if Shimoda and the other plaintiffs had valid claims to damages, the defense said, those claims ceased to exist when a waiver of damages became a part of the peace treaty signed by Japan and the United States.

This was the case the three judges in the Tokyo District Court had to decide.

In its decision the court pointed out that there was no dispute over the facts concerning the atomic bombings and their effects at Hiroshima and Nagasaki. Only two issues were in dispute: (1) the legality of atomic bombings; (2) the right of individuals to claim

damages as a result of injuries caused by violations of international law.

On the first issue, the Tokyo District Court ruled that the atomic attacks on Hiroshima and Nagasaki did indeed violate international law. The court cited four major reasons for the ruling:

(1) The indiscriminate bombing of undefended cities such as Hiroshima and Nagasaki is forbidden by international law.

(2) It could not be proved that bombing the cities was a "military necessity."

(3) The cities were not "military targets" with important munitions factories or army bases.

(4) The bomb caused even more suffering than those weapons already outlawed for producing "unnecessary and cruel forms of suffering." It is a principle of international law that nations at war have a duty to refrain from causing unnecessary suffering. This principle also extends to new weapons even before they have been specifically banned.

This ruling—that the atomic bombings violated international law—was favorable to the plaintiffs. But the issue involving the plaintiffs' right to a direct claim to damages was a separate issue. Here, the court ruled in favor of the defendant.

The court granted that a belligerent nation is liable for damages when it illegally injures another belligerent. In the Shimoda case, the court said, the United States was indeed liable for damages and should have paid Japan.

Traditionally, however, international law has applied only to governments, not to persons. So, in this case, Shimoda and the other plaintiffs were not entitled to damages.

But the court also said, in effect, that it was *possible* to grant rights to individuals under international law:

> Traditional thinking limits the subject of rights in international law to the state [governments], either because international law is the law which regulates the relations of the states or because international law is formed on the basis of the common consent of the states. . . . However, it does not necessarily follow that an individual cannot become the subject of rights in international law. . . . It is possible in theory for international law to recognize individual rights even when international law has no effect within a country.

But the Tokyo court was not itself ready to go that far. The right of individuals to claim damages could be conferred by international agreement, but could not yet be assumed to exist generally under

international law. The court thus denied the plaintiffs' claims for damages for this reason: "It is still proper to understand that individuals are not the subject of rights in international law, unless it is concretely recognized by treaties."

The potential significance of the Shimoda case goes far beyond the court's decision to deny the plaintiffs' claim for damages. The court ruled that atomic bombings are illegal on the basis of existing international law. And the court did suggest, looking to the future, that individuals *could* acquire rights under a new or evolving system of international law.

Discussing the Issues

1. Did the Tokyo District Court decide that the atomic bombing of Hiroshima and Nagasaki was legal or illegal under international law? If you had been one of the judges, how would you have voted?

2. Suppose the Tokyo District Court had decided that Shimoda and the other plaintiffs *could* collect damages in this case. Do you think that other survivors of Hiroshima and Nagasaki would then have sued for damages? Do you suppose that the Tokyo judges thought about this before arriving at their decision?

Defining Principles

1. The International Court of Justice (the main judicial body of the United Nations) hears only cases that *nations* submit to it. But imagine a future situation in which the International Court has authority to hear cases brought by *individuals*. Now assume that the five plaintiffs in the Shimoda case are suing the United States for damages before the International Court. What arguments do you think would be stressed by the plaintiffs' attorneys? By the U.S. defense attorneys? If you were a judge on the International Court, how would you decide?

2. Now imagine another situation—a meeting of White House officials, together with members of the Justice Department and Congressional leaders. Assume that the U.S. government has lost the Shimoda case before the International Court. Some people at the White House meeting feel that the court's ruling sets a dangerous precedent by allowing individuals to collect damages directly from a foreign government without going through their own government. Other officials disagree. What do you think the people at the White House meeting would decide to do?

Case Four

My Lai

"I did not think in terms of men, women, and children. They were all classified the same–just as enemy."

Prologue

The assault on the Vietnamese village of My Lai was reported at the time as a victory for the American forces. *The New York Times*, like many other American newspapers on March 17, 1968, gave front-page coverage to the assault. The *Times* article said, in part: "The operation is another American offensive to clear enemy pockets still threatening the cities. While the two companies of United States soldiers moved in on the enemy force from opposite sides, heavy artillery barrages and armed helicopters were called in to pound the North Vietnamese soldiers." The newspaper reports, based on information released through official channels in Saigon, noted that 128 enemy soldiers had been killed in the operation, two Americans had died, and ten had been wounded.

Then in the daily flood of news from Vietnam, Americans soon forgot about the assault on the hamlet known as My Lai 4. But the mission was not forgotten so quickly in Vietnam. Rumors began to spread among American soldiers that something out of the ordinary had happened at My Lai. Some of them called it "a turkey shoot." Others, depending on their points of view, described it as "a massacre."

A young helicopter gunner, Ronald L. Ridenhour, from Phoenix, Arizona, was among many GIs who heard the rumors about My Lai. He had a nagging suspicion that there might be some truth to the

stories about a massacre. Flying over the hamlet a few days after the assault mission, he had seen a dead Vietnamese woman lying in a rice paddy—but no people or other signs of life.

After he was transferred to another unit, Ridenhour met soldiers who said they had been with the Army company that swept through My Lai. Their stories were similar. They had gone into My Lai, they said, with orders to destroy everything and everyone in sight. Even though "Charlie" Company (C Company, First Battalion, 20th Infantry Regiment, 11th Infantry Brigade, Americal Division) had encountered no hostile action, the GIs said they had killed every man, woman, and child in the hamlet. The story about a fierce battle with Viet Cong soldiers, they said, had been invented to make Charlie Company look good.

If it was true that military forces had killed unarmed civilians, the men of Charlie Company were guilty of acts defined in the *U.S. Army Field Manual* as war crimes (see page 49). In 1968, the United States Command in Saigon issued the following directive: "It is the responsibility of all military personnel having knowledge or receiving a report of an incident or of an act thought to be a war crime to make such an incident known to his commanding officer as soon as possible."

Ridenhour continued asking questions. But fearing for his own security while in Vietnam, he said nothing and put nothing in writing. When he returned home to Phoenix in December 1968, nine months after the assault on My Lai, he was determined to do something about what he suspected had happened in the hamlet. He prepared a long letter, detailing the reports about My Lai. He sent copies to President Nixon; to key Senators and Congressmen; and to officials at the Pentagon, State Department, and Joint Chiefs of Staff.

"After hearing this account," Ridenhour wrote in the letter, "I couldn't quite accept it. Somehow I just couldn't believe that not only had so many young American men participated in such an act of barbarism, but that their officers had ordered it."

He concluded the letter with a plea for an investigation:

> Exactly what did, in fact, occur in the village of "Pinkville" [Charlie Company's special name for My Lai] in March, 1968, I do not know for *certain,* but I am convinced that it was something very black indeed. I remain irrevocably persuaded that if you and I do truly believe in the principles of justice and the equality of every man, however humble, before the law, that forms the very backbone that this country is founded on, then we must press forward a widespread and public investigation of this matter with all our combined efforts.

Within two weeks after receiving the letter, the Army Chief of Staff's

office replied to Ronald Ridenhour: "Because the circumstances related in your letter concern events of a year or so ago, a proper investigation will take some time. This investigation is under way now."

The investigation continued in strict secrecy through the spring and summer. Finally, on September 5, 1969, Army press officers at Fort Benning, Georgia, announced that First Lieutenant William L. Calley, Jr., had been "charged with violation of Article 118 [of the Uniform Code of Military Justice], murder, for offenses allegedly committed against civilians while serving in Vietnam in March 1968."

The story aroused little interest. Those newspapers that did print the account buried it at the bottom of inside pages, drawing little or no attention to it. Then, more than a month after the press release, a free-lance writer, Seymour M. Hersh, received a telephone call from a Washington contact. Hersh later quoted his source as saying: "The

Lieutenant William Calley, arriving under guard for one of the My Lai trials. Calley was tried for murdering 22 Vietnamese civilians.

Army's trying to court-martial some guy in secret at Fort Benning for killing Vietnamese civilians."

Hersh immediately began his own investigation of the incident of My Lai, an effort that eventually earned him a Pulitzer Prize. On November 13, some of the most influential newspapers in the nation ran Hersh's story on their front pages. A week later the Cleveland *Plain Dealer* published gruesome photographs—which the newspaper said a former soldier had taken at My Lai—of sprawled bodies of men, women, and children. The next night, on the CBS evening news, a veteran of Charlie Company described in chilling detail what had happened to the people in the photographs.

The sensational disclosures of the events at My Lai set off a new Pentagon investigation, which finally involved 400 witnesses and more than 20,000 pages of testimony. The investigators heard that there had been in fact no military resistance at My Lai. There had not even been any male occupants in the village, except boys and old men. Yet, witnesses said, Charlie Company soldiers had wiped out virtually every person they encountered. When Army investigators searched the area, in November 1970, they uncovered three mass graves and a ditch filled with bodies. An exact count was not possible, but the Army team estimated that between 400 and 500 people had died at My Lai.

Eventually, 25 officers and enlisted men were charged with violations of military law in connection with the My Lai incident. Some had been there themselves. Many were officers accused of covering up information about the incident at every level, from company headquarters up to division headquarters. Most were eventually acquitted or had the charges dropped. The case that held the center of attention, however, was still that of William Calley—charged personally with the premeditated murder of 22 Vietnamese civilians.

The Trial

The killing of Vietnamese civilians by American soldiers would be classified as a war crime under international law. In this courtroom, however, there were few references to war crimes or international law. This was a military court-martial, a domestic matter, in which the United States Army was trying one of its own members, Lieutenant William Calley, under United States military law. The charge, of course, would have been the same in any court—murder.

The trial lasted for months, the longest court-martial in American military history. It provided not only insights into the character of William Calley and the nature of the Vietnam war, but insights into

- the ways people think when there are only two categories–us and the enemy.

In the following excerpt from the trial testimony, Lieutenant Calley is on the witness stand testifying in his own behalf. He is questioned first by his own defense counsel, and then by the prosecutor. Calley has been claiming that whatever he did was under orders from his company commander, Captain Ernest Medina. Here Calley answers questions by his defense counsel about briefings Medina held before the My Lai action:

Q. Did he make any comments about the civilians, as to what they might be?

A. Well, the only remark he made . . . about civilians was that . . . all civilians had left the area, there were no civilians in the area. And anyone there would be considered enemies.

Q. Now, did you have a second briefing?

A. Yes, sir, we did.

Q. And who attended the second briefing?

A. Platoon leaders, basically.

Q. And who conducted that briefing?

A. Captain Medina, sir.

Q. Did he make any comments there about the manner of operation, what should be done in connection with turning out the area [clearing it of people], or in connection with what should be made certain in regards to the mission?

A. Yes, sir. He re-emphasized on us, on platoon leaders, that under no circumstances would we let anyone get behind us, nor would we leave anything standing in these villages. At least we would get out with what we had and we wouldn't be entrapped. That it was of the utmost to keep the high speed of attack going on. Platoon leaders would not stop for their own wounded. If a man went down, you had to keep going; Third Platoon would pick up casualties.

Q. Now, going back to the principal briefing of the company, do you have any recollection of anybody asking Captain Medina a question about who were civilians?

A. I believe there was a question raised.

Q. What is your recollection?

A. I believe somebody asked if that meant women and children, sir.

Q. Did Captain Medina respond to that question?

A. Yes, sir.

Q. What did he say?

A. He said that meant everything. He said that–he said he meant everything.

Q. Was anything said at that briefing—had anything been told to you about the nature of this area, specifically, whether it was classified by either being or not being a free-fire zone?

A. As long as I have known the area, this area was in the general classification of the word of free-fire zone [a zone in which soldiers may fire at will without waiting for orders].

Q. In the briefing with the platoon leaders, was there anything said at that briefing by Captain Medina about what to do with the prisoners?

A. No, sir, there wasn't.

Q. Was there a policy that had developed in that area . . . in connection with the use of Vietnamese in connection with clearing minefields?

A. I don't think it was said. It was understood when we made our final assault . . . we would have had civilians pulled in front of us, yes, sir.

Q. And what was the purpose for that?

A. Clear the minefields, sir.

Lieutenant Calley told about relaying orders to his men to "waste"—that is, kill—all captives. But at first he denied shooting at civilians himself.

Q. I will ask you whether during that operation you at any time consciously conceived or set down and formed an opinion to waste any man, woman, or child, Vietnamese?

A. No, sir, I didn't.

Q. Now, did you intend on that occasion to waste something?

A. To waste or destroy the *enemy.*

Q. Were you motivated by other things besides the fact that those were enemy?

A. Well, I was ordered to go in there and destroy the *enemy.* That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same and that was the classification that we dealt with, just as enemy soldiers.

Q. Who gave you that classification, the last time you got it?

A. Captain Medina, sir.

Q. And what did he tell you in connection with that?

A. That everybody in that area would be the enemy and everyone there would be destroyed. All enemies would be destroyed.

Then, under questioning by the prosecutor, Calley admitted that he had fired at Vietnamese people piled into a ditch:

Q. How long did you fire into the ditch?

A. I have no idea, sir.

Q. How many shots did you fire?

A. Six to eight, sir.
Q. One burst or semi-automatic?
A. Semi-automatic.
Q. Who did you fire at?
A. Into the ditch, sir.
Q. What at in the ditch?
A. At the people in the ditch, sir.
Q. How many people were there in the ditch?
A. I don't know, sir.
Q. Over how large an area were they in the ditch?
A. I don't know, sir.
Q. Could you give us an estimate as to how many people there were in the ditch?
A. No, sir.
Q. Would you say it was a large group?
A. No, sir.
Q. You said yesterday, I believe previously, that you considered six to eight to be a large group?
A. Right, sir.
Q. Would you say it was six to eight?
A. I don't know, sir.
Q. You have no idea how many people you saw there?
A. No, sir, I don't know. I don't.
Q. What were these people doing as they were being fired upon?
A. Nothing, sir.
Q. Were they being hit?
A. I would imagine so, sir.
Q. Do you know?
A. I don't know if they were being hit when I saw them, no, sir.
Q. Do you know if you hit any of them?
A. No, sir, I don't.
Q. How far away were you from them when you fired?
A. The muzzle would have been five feet, sir.
Q. You didn't see the bullets' impact?
A. Not that I recall, no, sir.
Q. How do you know these people were dead when you left the ditch there?
A. I don't know, sir, that they were, sir.
Q. Didn't you say yesterday that they were apparently all dead?
A. I said they were apparently all dead, but I don't know exactly if they were dead, sir.
Q. Why were they apparently dead?
A. They were lying still and weren't moving.

During many years of warfare in Indochina, millions of civilians were killed, wounded, or made homeless—even though rules of international law provided for the protection of civilians.

Q. You don't know whether any of your men fired into the ditch?

A. No, sir, I wasn't paying attention to where they were firing, how they were firing, how they were holding their weapons. My main thing was—go on, finish off those people as fast as possible and get my people out into position, sir.

Q. Did you tell Captain Medina that you had shot the people in the ditch?

A. Yes, sir, I did.

Q. Did he ask any facts about that?

A. No, sir.

Q. How did you tell him about it?

A. He asked—well, after the higher [superior officer] called back and

asked—I said it had been reported that a lot of civilians were killed in the area. He wanted to know what the percentage of civilians was.

Q. What did you tell him?

A. I told him he would have to make that decision, sir.

Q. Is that what you told him—those were your exact words to the captain?

A. Yes, sir.

Q. The group of Vietnamese that your platoon had, were all of them killed in the ditch?

A. I don't know, sir.

Q. Let me ask you this: Did you have any saved up for the minefield?

A. No, sir, I did not.

Q. Did you testify that you received an order to save some of them for the minefield?

A. Yes, sir, I did.

Q. Why didn't you save some up for the minefields?

A. Captain Medina rescinded that order and told me to waste them, sir.

Q. All right, now, what's the substance and effect of the conversation you had with Captain Medina in connection with your failure to move?

A. Well, I was still in the same basic location, and Captain Medina more or less called me and asked me why I had disobeyed his orders and hadn't moved out as he had directed me to do. And I told him again that I was moving as fast as I possibly could, and I was checking these bunkers in the southern part of the village, and that I still had Vietnamese people there, sir, that were slowing me down.

Q. And what did Captain Medina tell you?

A. Basically, the hell with bunkers. Waste the people and get your people out of there.

Q. Now, at any time did you stop and consider the legality or illegality of those orders?

A. No, sir.

Interviewed while awaiting the verdict of the military jury, Lieutenant Calley told a reporter he hoped the My Lai case would bring attention to the terrors of war:

> The thing that makes My Lai so unique, it was a small tragedy in a small place, but for once, man was able to see all the hells of war all at once.
>
> I can't say I am proud of ever being in My Lai, or ever participating in war. But I will be extremely proud if My Lai shows the world what war is and that the world needs to do something about stopping war.
>
> Many people say war is hell who have never experienced it, but it is more than hell for those people tied up in it.

I am hopeful that My Lai will bring the meaning of war to the surface not only to our nation but to all nations.

My recommendation is that this nation cannot afford to involve itself in war.

On March 29, 1971, Lieutenant Calley was found guilty of the charges against him. Here is part of the statement he made after the verdict was announced:

I'm not going to stand here and plead for my life or my freedom.

But I would like you to consider a thousand more lives that are going to be lost in Southeast Asia, the thousands more to be imprisoned, not only here in the United States, but in North Vietnam and in hospitals all over the world as amputees.

I've never known a soldier, nor did I ever myself, ever wantonly kill a human being in my entire life. If I have committed a crime, the only crime I've committed is in judgment of my values. Apparently I valued my troops' lives more than I did that of the enemy.

When my troops were getting massacred and mauled by an enemy I couldn't see, I couldn't feel, and I couldn't touch . . . nobody in the military system ever described them as anything other than Communism.

They didn't give it a race, they didn't give it a sex, they didn't give it an age. They never let me believe it was just a philosophy in a man's mind. That was my enemy out there.

And when it became between me and that enemy, I had to value the lives of my troops—and I feel that was the only crime I have committed.

Discussing the Issues

1. Do you think the trial of Calley, and the world-wide exposure of the My Lai incident in the press and on television, will help to prevent similar incidents in the future? Why or why not?

2. Some people said that Calley's conviction tended to put the blame for war crimes on the servicemen closest to the fighting—the infantrymen who must make the most difficult decisions under the most dangerous conditions. A bomber pilot is not asked to make similar judgments—or to take the blame for his actions. Do you believe that pilots whose bombs kill civilians should be tried for war crimes? Why or why not?

3. Some people saw Calley as the scapegoat for the guilt of higher military and political officials—or even for the "collective guilt" of the American people as a whole. What do you think about collective guilt? Are the citizens of a nation, such as Nazi Germany, responsible for war crimes if, as individuals, they do nothing to prevent them?

4. There was a great deal of other evidence presented in the Calley trial in addition to the material given in this book. Longer excerpts may be found in the *New York Times* of February 24, 1971. On the basis of the

excerpts available to you, in this book or elsewhere, what verdict would you have reached if you hac. been a judge at his trial? Why?

Defining Principles

1. One way to enforce international laws governing individual responsibilities in wartime is to make the nation-states themselves responsible for enforcement. The *Geneva Conventions on the Law of War*—revised August 12, 1949, and signed by 58 nations—did just that. These nations agreed to require their own citizens to obey the Geneva Conventions, just as if these were their own national laws. The *U.S. Army Field Manual,* which Lieutenant Calley should have been familiar with, states how the Geneva Conventions apply to members of the U.S. Army. Excerpts appear on pages 49-50 of this book. Read especially §507 and §509. Is the wording of §509 (b) an adequate guideline about what to do if one is ordered to commit an act that might be considered a war crime?

2. Nation-states obey international law on a voluntary basis. What do you think are the practical advantages and disadvantages of enforcing international law through national legal systems?

U.S. Army Field Manual: Excerpts

§ 506. Suppression of War Crimes

(a) *Geneva Conventions of 1949.* The Geneva Conventions of 1949 contain the following common undertakings:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or ordering to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . .

(c) *Grave Breaches.* "Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law.

If committed by persons subject to United States military law, these "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. . . .

§ 507. Universality of Jurisdiction

(a) *Victims of War Crimes.* The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.

(b) *Persons Charged with War Crimes.* The United States normally punishes war crimes as such only if they are committed by enemy nations or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. . . . Commanding Officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

§ 508. Penal Sanctions

The Punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. . . .

§ 509. Defense of Superior Orders

(a) The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of the accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of a war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(b) In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders. . . .

§ 510. Government Officials

The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.

§ 511. Acts Not Punished in Domestic Law

The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Future-Building

The four cases discussed in this book raise some important questions: Is it possible to devise a world system which effectively protects individual rights and encourages individual responsibility? What would such a system be like? Upon what moral and legal principles should it be based?

One way for you to answer these questions is to "future-build"—that is, to plan your own model of what you think a future system should be like. Start with what you already know about the present system from the four cases in this book. The following points will help you organize your information:

(1) Note the three arguments commonly raised in defense of alleged war crimes: (a) "I was ordered to do it." (b) "Everybody does it. It is not fair for you, who are guilty of similar crimes, to try me just because we lost the war." (c) "I broke no law existing at the time of my action." How adequately do the Nuremberg Principles (pages 26–27) and the 1949 Geneva Conventions (as presented in the *U.S. Army Field Manual,* pages 49–50) deal with each of the three arguments?

(2) If a person does not have the *right* to refuse to take part in an illegal war, should he be held *responsible* for having taken part? Should it be a stated principle of international law that an individual does have this right and that he cannot be punished by his government for exercising it? Go through all four cases in this book, and list what you think are the main individual rights

involved in each case and also what you think are the main questions to be answered regarding those rights.

(3) A major question to be considered in building your own future model is: Who will decide and who will enforce international law in cases of individual responsibility and individual rights? The last question at the end of the Nuremberg case (page 28) raised the question in terms of victors sitting in judgment over defeated enemies. The question was raised again after the My Lai case (page 49) in terms of enforcement through national court systems (in this case, a military court system). In each of these instances, what did you decide in discussing the question?

In today's world the nature of international law is changing. In the past it concerned only dealings between nation-states. Today, more and more, it is regulating relationships among groups such as multinational corporations and other organizations that operate across national boundaries.

However, the law changes only bit by bit, so there are a number of inconsistencies. The Nuremberg Tribunal tried individuals for *responsibility* for war crimes under international law. On the other hand, individuals do not have a general *right* to collect damages from foreign nations under international law. If an individual is wronged by a foreign nation, it is assumed that the wrong is done not to him, but to his nation-state. Therefore he can do nothing unless his nation-state is willing to press his claim. We saw this principle at work in the Shimoda case. So, in many ways, international law still means just what the words say: law between or among *nations*.

A signed agreement, called a treaty or convention, is the chief means of regulating what goes on between or among nations. Treaties end wars. Treaties adjust boundary disputes. Treaties establish such international organizations as NATO and the European Economic Community (the Common Market). And treaties provide many of the principles of international law.

Treaties are supposedly binding on the nation-states that sign them. According to the U.S. Constitution, an international agreement signed by the United States, if properly ratified by the Senate, automatically becomes "the supreme law of the land." The Supreme Court has ruled that such an agreement takes precedence over any earlier domestic law that conflicts with it. (But if a new domestic law is passed, contradicting the treaty, it then takes precedence in domestic cases.)

During a 1967 "mock trial" in Stockholm, Sweden, an international group of private citizens tried the U.S. for crimes of aggression in Vietnam. Front row, left to right: French authors Simone de Beauvoir and Jean-Paul Sartre, and Vladimir Dedijer, Yugoslav author and former U.N. delegate. The verdict was guilty.

A nation doesn't have to go this far, however, and many do not. Great Britain, for example, considers international law as subordinate to British domestic law. If the British government signed a treaty with another nation, and something in the treaty conflicted with one of Great Britain's own laws, then a British court would probably decide the dispute in favor of the British law—not the treaty.

No international court can try a case under international law unless the nations concerned consent to have the case tried. Nevertheless, except in wartime, nations do not often break treaties or other forms of international law. If there are disputes of a minor nature that cannot be settled otherwise, nations may submit them voluntarily to the International Court of Justice or to the Hague Tribunal for arbitration. Then, too, as in the case of the Middle East war of 1973, if major powers like the United States and the Soviet Union agree in the UN Security Council to support a peacekeeping operation under international law, there is no problem with enforcement.

Problems arise when the major powers disagree, or when one of

the major powers is itself the aggressor. The UN Charter in Article 42 states that the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." But Article 27 of the Charter gives each of the five major powers a veto over such actions. In addition, if a nation is militarily strong enough, there is no way to make that nation obey international law—unless the government of the nation consents.

Enforcement, however, need not depend solely on military power. Any society has to accept its own laws in the first place and to want them enforced. In the past, as one legal scholar remarked, the problem with international law was that it "developed as a means for regulating external contacts [among nations] rather than as the expression of the life of a true society." But the world we live in is becoming—slowly in some respects, more quickly in others—a "true society."

This is the next step in building your model. Once you have examined and discussed "what is," then think about "what should be" in a world society. Project the present system, the "what is," into the future. Will it adequately safeguard individual rights? Will it provide adequate guidelines for individual responsibility? What parts of the present system would you keep? What would you change?

What about enforcement of international law? Can we continue to rely mainly on nation-states themselves for enforcement? Can the United Nations judicial and enforcement machinery be improved?

Do you think some kind of "supranational" legal authority could become acceptable to enough nations to get it established? This would mean giving up at least some degree of our own national sovereignty. Do you think most Americans would be willing to give up any of their national sovereignty to a supranational authority? Would *you* be willing to do this?

In your future-building, you should also try to think of what can go wrong with your model. Is it practical? Will it work in the real world? Will it be fair to individuals of all nations—nations that have little power as well as those that have much power?

In effect you are not only deciding the major features of a world system for guiding individual responsibility and protecting individual rights—but you are also deciding a very important aspect of the kind of future world you want.

Then you have one final decision to make: What will be necessary to extend your model into the real world of the future? And what actual steps can *you* take to bring this about?

For Further Reading

For students who would like to explore, in greater depth and detail, questions of individual rights and responsibilities in wartime, the following books are suggested. Hardcover editions can be found in many libraries, and almost all are available in paperback.

Browning, Frank, and Forman, Dorothy, eds. *The Wasted Nations: Report of the International Commission of Enquiry into United States Crimes in Indochina.* Harper & Row, 1972.
This book, which includes numerous statements by Vietnamese and former American soldiers, examines American tactics in Vietnam and finds the United States guilty of war crimes.

Drinan, Robert F., S.J. *Vietnam and Armageddon: Peace, War and the Christian Conscience.* Sheed and Ward, 1970.
The author, a priest and Congressman, raises questions of individual conscience in relation to the Vietnam war, and to war in general. He also raises the question of applying the Nuremberg Principles to actions of individual Americans in Vietnam.

Falk, Richard A.; Kolko, Gabriel; and Lifton, Robert Jay, eds. *Crimes of War.* Vintage Books, 1971.
This 590-page anthology is a comprehensive examination of the subject from several points of view—legal, political, and psychological. The book includes articles, documents, and eyewitness accounts.

Finn, James, ed. *Conscience and Command: Justice and Discipline in the Military.* Vintage Books, 1971.
The articles in this book add up to an argument that military personnel should have the same constitutional rights as civilians. Among the contributions are stories of men who were punished by their commanders for having followed their consciences instead of military orders.

Grunberger, Richard. *The 12-Year Reich: A Social History of Nazi Germany, 1933-1945.* Ballantine Books, 1971.
Excellent background reading for understanding the kind of society which could produce war criminals such as those tried and convicted at Nuremberg. Concentrating on the ordinary citizen under the Nazi regime, the book includes a great deal of original source material, such as newspaper accounts.

Hersey, John. *Hiroshima.* Bantam Books, 1946.
This book is still the most vivid written account of what it was like to be in Hiroshima the day the atomic bomb was dropped on that city.

Hersh, Seymour M. *My Lai 4: A Report on the Massacre and Its Aftermath.* Vintage Books, 1970.
The author, an investigative reporter, was the first to break the My Lai story in the American press. In this book, he reconstructs as completely as possible, from interviews with men who were there, just what happened at My Lai on March 16, 1968. This book presents an unforgettable picture of the kind of battlefield mentality that makes war crimes possible.

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Lawrence, Jerome, and Lee, Robert E. *The Night Thoreau Spent in Jail.* Bantam Books, 1971.
This play is based upon Thoreau's act of conscience in 1846, when he went to jail rather than pay a poll tax. He was protesting the Mexican War, which he considered immoral.

Lynd, Alice, ed. *We Won't Go: Personal Accounts of War Objectors.* Beacon Press, 1968.
A collection of personal accounts of men who, during the Vietnam war, followed their consciences. Refusing to be drafted, they were subjected to legal penalties.

Rivkin, Robert S. *The Rights of Servicemen: The Basic ACLU Guide to a Serviceman's Rights.* Avon Books, 1972.
This guide to the individual's rights as a member of the U.S. armed forces covers a number of topics, including the right to disobey illegal orders. An appendix lists lawyer-referral agencies and international military-counseling agencies.

Taylor, Telford. *Nuremberg and Vietnam: An American Tragedy.* Quadrangle, 1970.
Taylor was the U.S. Chief Counsel during the Nuremberg trial. In this book he discusses the significance of the Nuremberg proceedings and their relevance to what later took place in Vietnam. He also discusses the historical development of the concept of war crimes.

Vincent, Jack E. *A Handbook of International Relations: A Guide to Terms, Theory, and Practice.* Barron's.
An excellent reference book for basic information on international relations and foreign affairs, including, in alphabetical order, specific treaties and the Rules of War.

Films to Look For

Following are some feature films which are often reshown in movie theaters, on television, or in special film presentations by universities and other groups and organizations:

All Quiet on the Western Front. A story of individual Germans during World War I, who volunteer for military service with romantic notions about the nature of war—and who find it something other than what they had thought it would be. This powerful film was produced in 1930.

The Hill. A film about the treatment of prisoners in a British military stockade in North Africa during World War II.

Judgment at Nuremberg. A dramatic presentation of the Nuremberg trial proceedings, from both points of view—prosecution and defense.

King and Country. A film about a British soldier in World War I who, sickened by the war, simply walks away—and later faces a court-martial.

Night and Fog. A short film captured from the Germans in World War II, showing what a concentration camp was like for prisoners under the Nazi regime.

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War Criminals, War Victims

In time of war, what rights does a person have?
In time of war, what responsibilities does a person have?

The authors of this book examine these important questions through four actual courtroom cases:

(1) The trial of a Confederate captain for prison-camp atrocities committed during the American Civil War.
(2) The trial of German military and civilian leaders at Nuremberg for war crimes in planning and waging World War II.
(3) A civil suit brought by five Japanese to collect damages for injuries suffered when the United States dropped atomic bombs on Hiroshima and Nagasaki at the end of World War II.
(4) The trial of U.S. Lieutenant William Calley for the murder of civilians in the village of My Lai during the war in Vietnam.

These four dramatic cases raise an additional question: Is it possible to devise a world system which more effectively protects individual rights--and more effectively encourages individual responsibility?

How we solve this problem, according to the authors, will tell us a great deal about the kind of world we can expect in the future.

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